Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. 95-616

ARTHUR CALDERON, Warden of San Quentin State Prison, and
DANIEL E. LUNGREN, Attorney General of California, Petitioners,

v.

RICHARD LOUIS ARNOLD PHILLIPS, Respondent.

OPPOSITION TO WRIT OF CERTIORARI

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pro se with advisory counsel
C-13707 3-E-111
San Quentin State Prison
San Quentin, CA 94964

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1. PETITIONERS HAVE FAILED TO ESTABLISH THAT THIS CASE PRESENTS A FEDERAL ISSUE WHICH JUSTIFIES THIS COURT'S ATTENTION.

> "A petition for writ of certiorari will be granted only when there are special and important reasons therefor." (Supreme Court Rules, Rule 10.1.)

Petitioners attempt to show that this case merits the expenditure of this court's precious and limited resources by suggesting that the Ninth Circuit decision will result in a flood of capital inmates attempting to follow Respondent Phillips' lead by seeking federal review of the guilt adjudication in bifurcated cases while an appeal of a retrial as to penalty is still pending in state court. (Petition p. 11.)

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However, logic dictates that petitioners' prediction of a flood of federal litigation resulting from the lower court decision will not occur. The reason is simple--early federal review of the constitutional validity of state guilt adjudication in capital cases will expedite imposition of the death sentence.[1] Since few prisoners sentenced to death want to speed up their execution, it is probable that the vast majority of condemned prisoners will want to delay a federal attack upon their guilt adjudication for as long as possible, and, therefore, will delay such an attack until after the penalty litigation is final in state courts.

Petitioners also assert that the Ninth Circuit decision "is a significant affront to the comity traditionally afforded state court proceedings." (Petition, p. 11.) This is not true. The California courts have reviewed and rejected all of Phillips' attacks upon his guilt adjudication which he has raised in his federal habeas corpus petition. Therefore, federal review of guilt issues which are final in California courts does not in any manner interfere with the right or ability of California courts to first decide such issues.

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1. For example, Phillips' federal habeas corpus petition attacks only the constitutional validity of his guilt adjudication. The sooner proceedings upon this petition commence the sooner the federal proceedings related to guilt will end.

Petitioners presume Phillips will even desire to file further federal habeas corpus petitions attacking penalty issues for a different set of operative facts, at some unknown date in the distant future. Assuming *arguendo* Phillips should choose to do so, future federal habeas corpus petitions will be limited to an attack upon the death sentence. If Phillips lacks grounds

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Comity considerations actually support a conclusion that federal courts should decide Phillips' guilt issues as soon as possible. If a federal court decides that Phillips is entitled to a new guilt trial, the California Supreme Court--a busy court which does not need any unnecessary work--will not have to decide whether Phillips was properly sentenced to death in his pending (or any future) automatic penalty appeal.

Finally, petitioners say the Ninth Circuit decision "actually rewards a defendant for delaying the resolution of the penalty retrial." (Petition p. 11.) However, petitioners do not explain how or why Phillips gains any advantage in either federal court or in the state courts from his alleged delay of the penalty retrial. Since the penalty issues pending in state court are completely different from the guilt issues Phillips has raised in federal court,[2] the fact that the penalty appeal is pending gives Phillips no apparent advantage in federal court and the pending federal habeas corpus petition gives Phillips no apparent advantage in state court.

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for a federal attack upon his sentence, Phillips' case will be final in federal courts upon affirmance of his death sentence by the California Supreme Court.

Petitioners want to delay the start of the federal proceedings related to Phillips' guilt until after his death sentence has been affirmed by the California Supreme Court. This could be a very long delay. If Phillips' pending state penalty appeal is successful, there will be another penalty retrial, followed by another automatic penalty appeal. If the subsequent appeal is successful, there will be yet another penalty trial followed by yet another appeal. There is no way to determine when this process will end, but it easily could continue for many years. Under Petitioner's position the guilt issues from an unrelated set of operative facts must lay dormant.

2. The guilt trial attacked in Phillips' federal habeas corpus petition occurred in 1980. (Petitioner's Appendix M. p. 2, ¶ 2.) His second penalty

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On the other hand, petitioners allege "It is equally beyond dispute that delay is the hallmark of the defense..." in capital cases. These are inconsistent positions.

2. REGARDLESS OF THE DELAY IN STATE PROCEEDINGS, 28 U.S.C. SECTION 2254 GRANTS RESPONDENT PHILLIPS A STATUTORY RIGHT TO PROCEED UPON HIS FEDERAL HABEAS CORPUS PETITION.

Attorney Horvath urged in his reply to the Petition for Rehearing below:

> "Section 2254 subdivision (a) provides in relevant part that a district court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States." (Emphasis added.) Appellant [Phillips] has filed such a petition.
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> "Section 2254 subdivision (b) states an exception to the general rule--federal habeas corpus relief cannot be granted unless the petitioner has exhausted his state remedies upon the federal claims asserted. Appellant's habeas corpus petition pleads exhaustion of his state remedies upon all federal claims asserted. (Habeas Corpus Petition, p. 15, ¶ 11.) Therefore, the exception does not apply and appellant has a statutory right to proceed upon his federal petition.
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> "Appellee may, of course, take issue with this factual allegation and all other factual allegations made in appellant's habeas corpus petition in the district court. However, appellant's habeas corpus petition properly pleads a federal action authorized by statute; therefore, the district court erred in dismissing the petition.

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trial from which an automatic appeal is pending in state court occurred in 1991. (Petitioner's Appendix M, p. 21, ¶ 8.) Thus, the guilt trial attacked in federal court occurred 11 years before the second penalty trial. The two trials were before different juries; the appellate record of the two trials is not the same; the issues in the state penalty appeal are completely different from the guilt issues raised in federal court.

> "By enacting section 2254 and thereby granting appellant a right to proceed upon his federal petition, Congress has resolved all relevant jurisprudential concerns in appellant's favor. Unless the statute is held to be unconstitutional, federal courts are not free to disregard this statute by denying appellant his statutory right to proceed upon the instant habeas corpus petition." (Petitioner's Appendix X, pp. 14-16.)

This Court has not held section 2254 to be unconstitutional or ignored the statute's mandate. Rather, this high court has applied the statute according to its express terms by concluding that the only condition precedent to a federal habeas corpus petition is exhaustion of the claims made in such a petition. (*Rose v. Lundy*, 455 U.S. 509, 520 [Prisoners who submit mixed petitions "nevertheless are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of the claims."].)

The Ninth Circuit correctly concluded that *Rose v. Lundy* does not preclude Phillips' habeas corpus petition. (Petitioner's Appendix A, pp. 2804-2805.) Petitioners do not urge that the Ninth Circuit's conclusion is wrong.

The Ninth Circuit correctly concluded that the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) does not preclude Phillips' habeas corpus petition. (Petitioner's Appendix A, p. 5805.)

In their petition for certiorari, petitioners only attack upon the Ninth Circuit's analysis of the abstention issue is an assertion that the court erred in concluding that the guilt adjudication is final in state court.

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However, section 2254 requires only that the issues raised in a federal habeas corpus petition be exhausted (final) in state court. Upon the record before it, the Ninth Circuit did not err in concluding that the guilt issues raised in Phillips' federal habeas corpus petition are final in California courts.

Phillips alleged in his federal habeas corpus petition:

> "The judgment convicting petitioner [Phillips] of murder with special circumstances is final in California courts. Petitioner believes that he cannot obtain further review of the adjudication of guilt by either direct appeal of right or discretionary writ petition in California courts. (See, Declaration of attorney Donald Horvath, Exhibit 3, ¶ 6." (Petitioner's Appendix M. ¶ 11, pp. 21-22.)

The sworn declaration of attorney Donald Horvath directly supports the allegation quoted above. (Petitioner's Appendix X, p. 11.) Horvath's declaration is the only relevant evidence upon the exhaustion issue in the record on appeal before the Ninth Circuit.

Thus, Phillips has well-pleaded that he has exhausted his state remedies upon the guilt issues raised in his federal petition and the evidence before the Ninth Circuit fully supports its conclusion that such guilt issues are final in California courts.[3] Since the requirements of section 2254 have been met, the Ninth Circuit decision that Phillips is entitled to proceed upon his federal habeas corpus petition is correct.

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3. Petitioners' do not contend otherwise--their attack upon finality is not directed to the relevant issue of whether Phillips has exhausted his state remedies upon the issues raised in his federal habeas corpus petition.

If petitioners want to litigate the issue of whether Phillips has exhausted his state remedies upon the issues raised in his federal habeas

Petitioners contend that Phillips' guilt adjudication is not final in state court because there is a possibility that it may be overturned upon some ground different from the issues raised in the federal petition--such as a retroactive constitutional decision of this court. (Petition, pp. 23-24.)

The argument proves too much. Upon petitioner's view of finality, Phillips' guilt adjudication will not be final in state court until he is actually executed--until that time, there is a possibility that Phillips will benefit from a new retroactive constitutional decision of this court. If the possibility of a new retroactive decision prevents finality of a guilt adjudication as urged by petitioners, Phillips' guilt adjudication will never be final in state court and he never will be entitled to seek relief in federal court.

In any event, petitioners' argument is irrelevant. The federal law generally requires Phillips to first seek relief in state court and this law applies even after Phillips' penalty appeal has been decided (the time when petitioners apparently believe guilt issues in a bifurcated case are final in state court). Therefore, if this court should announce a new retroactive constitutional decisions which entitles Phillips to a new guilt trial after his penalty has been affirmed on appeal, Phillips would still have to exhaust his state remedies by filing a habeas corpus petition grounded upon that decision in state court. The same is true of any other guilt issues which have not been raised in the instant federal habeas corpus petition.

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corpus petition, they may do so in district court. The Ninth Circuit decision

There obviously is some possibility--however remote--that guilt issues could be pending in state and federal court at the same time.[4] However, such a speculative possibility is not a sufficient reason for federal courts to refuse to entertain the instant habeas corpus petition. If Phillips should in the future seek state relief from the guilt adjudication, a federal abstention issue would arise at that time.

Petitioners seriously misrepresent the possibility that Phillips will raise new guilt issues in the pending state penalty appeal. Petitioners say Phillips may raise guilt issues "that have not been raised in prior pleadings." (Petition, p. 24.) Actually, Phillips may raise only "guilt issues ground upon new facts not reasonably available to the defense at the time of the prior habeas corpus petitions." (Petitioner's Appendix Q, p. 3.) Petitioners have neglected to inform this court that Phillips' counsel on his state penalty appeal (Horvath) stated under oath that as of 22 September 1995 Horvath has discovered no such issues. (Declaration of Attorney Horvath, incorporated herein as Respondent's Exhibit A.) Horvath's declaration was attached to Phillips' Opposition for Stay of Mandate, and properly served upon petitioners.

(fn. 3 con't) expressly recognizes that petitioners may contest this factual allegation in district court. (Petitioner's Appendix A, p. 5808, fn. 4.) In attorney Horvath's reply to the petition for rehearing below, Phillips expressly recognized petitioners' right to litigate this, and all other factual issues framed in Phillips' habeas corpus petition, before the district court. (Petitioner's Appendix X, p. 15.)

4. If any further guilt issues are discovered they will most probably be yet further instances of prosecutorial misconduct, destruction of evidence, or ineffective assistance of counsel.

From the very beginning of this appeal, Phillips has urged that 28 U.S.C. § 2254 and *Rose v. Lundy*, 455 U.S. 509 are determinative of his right to proceed upon his federal habeas corpus petition. (Petitioner's Appendix Q, pp. 4-6, 11.) Petitioners have brought this case to our nation's highest court, but they still have not addressed Phillips' argument. With all due respect, petitioners should not waste this court's time unless they are prepared to say why section 2254 and *Rose v. Lundy* do not expressly, directly, and conclusively authorize Phillips to proceed upon his federal habeas corpus petition.

Petitioners complain about the Ninth Circuit's reliance upon the extraordinary delay in the state court proceedings to support its decision. In doing so, petitioners look a gift horse in the month. Section 2254 does not say Phillips may litigate exhausted claims in federal court only if the state courts take too long to decide his case.

The extraordinary delay portion of the Ninth Circuit opinion actually benefits petitioners because it imposes a limitation upon federal habeas corpus relief which is not stated in section 2254. This portion of the Ninth Circuit opinion substantially narrows its scope and precedential effect to cases which involve extraordinary delay. This is another reason why the flood of litigation predicted by petitioners will not occur and another reason why this court's intervention is not necessary.

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3. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT PHILLIPS' FEDERAL ATTACK UPON THE CONSTITUTIONAL VALIDITY OF HIS CONVICTION OF MURDER WITH SPECIAL CIRCUMSTANCES SHOULD NOT BE FURTHER DELAYED.

Phillips must prove the facts necessary to establish that his conviction in 1980 of murder with special circumstances is constitutionally invalid. (*Burkett v. Cunningham*, 826 F.2d 1208, 1218 (3rd Cir. 1987).) The operative facts already are 15 years old. If petitioners have their way, Phillips will be faced with the burden of proving facts at least 20 years old.

The resulting prejudice to Phillips from the past delay in proving the factual allegations of his federal habeas corpus petition is clear and compelling. Petitioners want to exacerbate the prejudicial effect of past delay by adding a substantial, unknown period of future delay before Phillips is allowed an opportunity to prove the factual issues raised in his federal petition.

Since Phillips urged in his first pleading below that additional delay will prejudice his ability to prove the factual allegations made in his federal habeas corpus petition, petitioners are aware of the problem.

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In his return to the Ninth Circuit's Order to Show Cause why the appeal should not be dismissed dated 30 December 1993, attorney Horvath argued:

> "A rule of law which requires that the penalty portion of petitioner's [Phillips] case finally be decided by California courts before he can make a federal habeas corpus attack upon the validity of the guilt adjudication long final in California courts would result in needless delay which would severely prejudice petitioner's ability to prove the factual allegations made in his federal habeas corpus petition. The crime was committed in 1977--sixteen years ago. Petitioner's guilt trial, the result of which he attacks upon various constitutional grounds in his federal petition, occurred in 1980--thirteen years ago.
>
> "It will take several years for the pending penalty appeal to be decided by the California Supreme Court. If petitioner's present death sentence is reversed on direct appeal, there will be yet another penalty trial and yet another automatic direct appeal. The process of penalty reversal and retrial could continue for a very long time.
>
> "Thus, if petitioner must wait for the penalty aspects of his case to be finally determined in state courts before he is allowed to attack the long final California guilt adjudication in federal court, he may be forced to litigate facts which occurred more than twenty years before the federal habeas corpus hearing! Witnesses die. Memories fade. Since petitioner has the burden of proving the constitutional defects in his 1980 guilt trial asserted in his federal petition, (*Burkett v. Cunningham*, 826 F.2d 1208, 1218 (3rd Cir. 1987) he is the party who will be prejudiced by the loss of material evidence when witnesses die or they no longer can remember what happened.[2]" (Petitioner's Appendix Q, pp. 8-10.)

However, petitioners don't address this issue in their petition for certiorari.

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Instead, petitioners talk about prejudice to Phillips at his second guilt trial, which prejudice would also exist if Phillips obtains a new guilt trial in federal court upon this habeas corpus petition. However, Phillips does not have the burden of proof in a second guilt trial and the factual issues at a second guilt trial will be completely different than the factual issues framed by Phillips' habeas corpus petition. The prejudice to Phillips from further delay in this federal writ proceedings is greater and more immediate than the prejudice at a future guilt trial.

The Ninth Circuit balanced the prejudice to Phillips from further delay in the federal writ proceedings against the relevant jurisprudential concerns and correctly concluded that the balance strongly weighed in favor of allowing Phillips to proceed in federal court now. (Petitioner's Appendix A, p. 5810.) This balance does NOT change upon a conclusion that Phillips was responsible for some of the past delay.

The issues presented by this case is whether Phillips must suffer additional prejudice from future delay! The cause of past delay simply is not relevant to this issue.

4. PETITIONERS HAVE FAILED TO SHOW THAT PHILLIPS IS RESPONSIBLE FOR THE PAST DELAYS IN THIS CASE.

Petitioner's position regarding the cause of past delay in this case is interesting, but very unfair.

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Petitioners apparently accept the idea that capital litigation takes time when they argue that there was not undue delay in state proceedings and the delay which did occur was not the fault of the state. Petitioners justify the time spent to extradite Phillips and to prosecute the first appeal by saying these things reasonably take time to accomplish. (Petition, pp. 27-28.)

However, petitioners refuse to acknowledge that Phillips also has a right to defend himself and the resulting litigation delay is equally justified.

Petitioners complain that Phillips filed habeas corpus petitions in state court. Petitioners conveniently forgot to mention there was no state habeas corpus petition filed in conjunction with Phillips' first automatic appeal--and that the California Supreme Court invited Phillips to address several issues via habeas corpus petition in their decision.

Phillips was required to exhaust his state remedies before seeking federal relief and cannot be faulted for doing what the law requires of him! Petitioners do not claim that any of the state habeas corpus petitions were frivolous or filed for purposes of delay.

No state court found that any of Phillips' state habeas corpus petitions were frivolous or filed for purposes of delay.

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Petitioners complain that Phillips waived trial dates and requested postponements of his retrial date. However, petitioners do not claim that there was not good cause for such postponements of the trial. Presumably, the trial court would have denied any request for a continuance which was not supported by a showing of good cause to do so.

Petitioners complain that Phillips changed counsel more than once. However, petitioners do not claim that there was not good cause for doing so. Presumably, the trial court would have denied any request to change counsel which was not supported by a showing of good cause to do so.

Petitioners complain that Phillips filed numerous motions. However, petitioners do not claim that such motions were frivolous or filed for purposes of delay. In fact, a substantial number of Phillips' motions were granted by the state trial court.

Petitioners complain that Phillips had the audacity to tape record the testimony at his penalty retrial. The tape recordings show that the court reporter made many transcription errors. However, petitioners do not deny that Phillips is entitled to an accurate record on appeal. Phillips did not hire the court reporter and is not responsible for the reporter's errors.[5] Phillips simply followed the example of many federal courts, who routinely record all court room activities. Phillips' submitted a motion to openly record all testimony. The trial court granted this motion. It also should be noted that the prosecutor in the penalty retrial did not object to Phillips' motion.

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5. In excess of 140 typewritten pages of errors in the retrial transcript.

In short, petitioners contend that any delay in state court proceedings which results from litigation which they initiate or desire is justified, but any delay which results from litigation which Phillips initiates or desires in unjustified "dilatory conduct." (Petition, p. 26.)

Petitioners contend they are not responsible for the delay in the Ninth Circuit proceedings in this case. (Petition, p. 27.) Phillips is not responsible for this delay either.

Petitioners blame Phillips for this delay by implying that the Ninth Circuit issued its Order to Show Cause because Phillips' advisory counsel Horvath failed to file the brief ordered by that court on 1 October 1992. (Petition, p. 7.) However, the reason attorney Horvath did not comply with the 1 October 1992 briefing order was his concern regarding the ethical propriety to do so, expressed in a letter to the court dated 16 October 1992[6] in which Horvath stated:

> "As counsel for Mr. Phillips, I do not believe I ethically can state a position or conclusion adverse to Mr. Phillips. It appears that the court may be asking for my independent analysis of the issue before it."

The Ninth Circuit's subsequent Order to Show Cause obviously was an attempt to cure this problem by seeking input from all parties.

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6. Since Horvath's 16 October 1992 letter to the Ninth Circuit involved other attorney-client matters, petitioners were not served a copy of this letter.

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CONCLUSION

The Ninth Circuit correctly concluded that Phillips legally is entitled to proceed upon his federal habeas corpus petition at this time. The decision below is intentionally very narrow, and, therefore will have minimal precedential effect upon other cases.

This case does not meet the requirements for certiorari because, as argued above, few condemned inmates will want to litigate guilt issues before they must do so.

Phillips urges this honorable court to ignore the personal attacks and posturing of Petitioners in their petition for writ of certiorari; and look to the sole question for which Certificate of Probable Cause issued:

> "(8) ...Is Petitioner [Phillips] precluded from federal review of guilt issues fully exhausted at the state level, while awaiting a second, unwaivable, automatic appeal in state court of unrelated penalty phase issues arising from a partial retrial?"

Phillips, with the excellent guidance and tutelage of advisory counsel Horvath, herein respectfully submits a response to writ of certiorari in compliance with Supreme Court Rule 15.1.

Having done so, I would be remiss if I did not speak to the closing of Justice Kleinfeld's concurring opinion: "I am puzzled why the sides are reversed in this case." (Petitioner's Appendix A, p. 5818.) Phillips stated to the Ninth Circuit in his Response to Motion for Rehearing (Petitioner's Appendix W, pp. 15-16.) and closes with reiterating the point again:

> "The state can only delay so long. Sooner or later they are going to have to face the music - Appellant [Phillips] caught Madera County officials with their hands dirty. (See writ before district court.)"

Therefore, the petition should be denied.

Respondent Richard Louis Arnold Phillips so prays.

DATED: 6 November 1995

Richard Louis Arnold Phillips
RICHARD LOUIS ARNOLD PHILLIPS
Proceeding *pro se*
with advisory counsel

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CERTIFICATE OF SERVICE

RICHARD L.A. PHILLIPS, Petitioner, vs. ARTHUR CALDERON, Warden Defendant.	)	Case No. 95-616

I, the undersigned, hereby certify that I am a citizen of the United States, that I am over the age of 18 years, and am a party to the within entitled action. My business/residence address is:

C-13707 3-E-111
San Quentin State Prison
San Quentin, CA 94964

I served a copy of the attached:

OPPOSITION TO WRIT OF CERTIORARI

upon the interested parties by placing a true and correct copy thereof in an envelope and sealing same, postpaid and by depositing same for delivery in the United States mail at San Quentin, California, per the restrictions of San Quentin State Prison, concerning inmate delivery to correctional authorities of outgoing legal mail, addressed as follows:

STATE ATTORNEY GENERAL
P.O. Box 944255
Sacramento, CA 94244

A. CALDERON, Warden
San Quentin State Prison
San Quentin, CA 94964

I declare under penalty of perjury that the foregoing is true and correct; and that this was executed on the 6th day of November 1995 in San Quentin, California.

Richard L.A. Phillips
RICHARD L.A. PHILLIPS
pro se with advisory counsel

DECLARATION OF ATTORNEY DONALD J. HORVATH

I, Donald J. Horvath, say:

1. I am an attorney at law licensed to practice in California. I was appointed advisory counsel for appellant Phillips in this action and was appointed to represent Phillips upon his pending direct appeal from imposition of a second death penalty in the California Supreme Court.

2. To date, I have not discovered any new habeas corpus guilt issues which are grounded upon facts not reasonably available to the defense at the time of the prior habeas petitions.

3. In my opinion, it is very unlikely that any new guilt issues exist which meet the very narrow requirements (stated in paragraph 2 above) for consideration by the California Supreme Court.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct, and that this declaration was executed on 22 September 1995 at Coarsegold, California.

Donald J. Horvath

EXHIBIT "A"

BEST AVAILABLE COPY